No. 108

In the Supreme Court of the United States

OCTOBER TERM, 1962

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the district court (R. 241–262) is reported at 199 F. Supp. 635. The report of the Interstate Commerce Commission (R. 4–69) is printed at 313 I.C.C. 23.

JURISDICTION

The judgment of the district court was entered on January 8, 1962 (R. 263–264). The Interstate Commerce Commission filed its notice of appeal on March 9, 1962 (R. 264–266), and probable jurisdiction was noted on October 8, 1962 (R. 274). The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901 and 1001, and sections 15(7) and 15a of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 15(7) and 15a are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

Appellee railroads proposed substantially reduced trailer-on-flatcar (TOFC) rates between certain points also served by coastwise water carriers. The water carrier out-of-pocket and fully-distributed costs of moving the traffic were in almost all instances below the out-of-pocket and fully-distributed costs, respectively, of the railroads' TOFC service. The reduced rail rates, which exceeded the railroads' out-of-pocket costs in all instances and their fully-distributed costs in some instances, were at the levels of the water carrier rates for the same movements but were substantially below the level maintained by the railroads for similar traffic elsewhere. The following questions are presented:

1. Whether, under sections 15(7) and 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may reject as not shown to be just and reasonable the proposed railroad TOFC rates without finding, as the controlling consideration, that the competing coastwise water carriers are the low cost mode of transportation, where the Commission found that the coastwise water carriers' service cannot compete at equal rates with the railroads' service, that the reduced rail rates are part of a program of rail rate reductions which threaten the continued ex-

istence of the coastwise water carrier industry, and that coastwise shipping is important for national defense purposes and is needed by the public as an integral part of the national transportation system.

2. Whether the Commission must find that the water carriers are the "overall low-cost mode," as well as the low-cost mode with respect to the particular traffic involved, before it may reject a rail rate returning fully-distributed cost to protect the rate structure of the water carriers.

3. Whether, if the Commission must make such findings, it is in any event precluded from rejecting a rail rate for a particular movement which yields the railroads' fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier for such movement.

STATEMENT

This case involves the validity of so much of an order of the Interstate Commerce Commission as directed the cancellation of some 66 substantially reduced commodity rates proposed by several railroads for their trailer-on-flatcar (TOFC) service between points in the East, on the one hand, and Dallas and Ft. Worth, Texas, on the other. The railroads' proposed rate reductions were limited to points served by the other deep-water common carriers now engaged in the Atlantic-Gulf coastwise trade, namely, Sea-Land Service, Inc. (referred to in the Commission's report by its former name of Pan-Atlantic Steamship Corporation) and Seatrain Lines, Inc.

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1. Beginning in 1933, Sea-Land operated as a break-bulk [1] water carrier, except during the World War II years when all vessels employed in the deep-water coastal trade were requisitioned by the United States Government for national defense purposes. In 1957, Sea-Land suspended its Atlantic-Gulf coastwise break-bulk service and converted four vessels into crane-equipped trailerships, each capable of holding 226 demountable highway trailers. As a consequence, it became possible for Sea-Land to provide a motor-water-motor service in which freight is moved in demountable trailers from the consignors over highways by certificated motor carriers or by use of Sea-Land's own motor equipment to the ports, where the trailers are lifted onto Sea-Land ships for movement via water to the destination ports where the process is reversed. The conversion to the more efficient trailership service has reduced Sea-Land's operating costs and has brought about a reduction in the cargo-handling time and the in-port vessel time.

In Seatrain's service, freight is transported to its dock at Edgewater, New Jersey, in railroad cars. The cars and their contents are then lifted onto Seatrain's vessels for the water leg of the journey to Atlantic and Gulf ports served by Seatrain. At destination, the reverse operation occurs and the cars are delivered by rail to the consignee. Thus, it is a rail-water-rail, non-break-bulk service which offers to

[1] Service of the break-bulk type involved the physical unloading of freight from rail car or truck and loading of the cargo into the ships and the reverse of this operation at destination.

the shipper the transportation of his lading in a rail car from consignor to consignee.[2]

Railroad TOFC service is a motor-rail-motor operation in which the shipment leaves the consignor in a motor carrier trailer and arrives at the door of the consignee in the same trailer, the laden tailer having been transported in the line haul on a railroad flatcar. While this type of operation has been engaged in sporadically since 1926, its principal growth has occurred in recent years, and the rail TOFC service between points in the southwest and points in the east was inaugurated in the summer of 1956.

Traditionally, water rates, including water-rail and water-motor rates, have been maintained at levels differentially lower than the corresponding all-rail rates, principally because of disadvantages in the water service due to perils of the sea, slower transit time, and infrequency of sailings.[3] When Sea-Land inaugurated its new trailership service in 1957, it published rates which, in general, were 5 to 7½ percent lower than the corresponding all-rail boxcar rates, but were less than the differentials which had existed by reason of the rates formerly maintained for the break-bulk service.

2. By schedules filed to become effective on November 14, 1957, and later, the railroads proposed to es-

[2] Seatrain's operations have previously been before this Court in *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612.

[3] See *Class Rate Investigation*, 1939, 286 I.C.C. 5 (1952), the last major proceeding in which the rates of Atlantic-Gulf coastwise water carriers were considered, where the Commission prescribed reasonable maximum class rates on ocean-rail traffic designed to preserve the then-existing differentials of the ocean-rail rates under the all-rail rates.

tablish the reduced TOFC rates at issue. Since the establishment of the reduced TOFC rates would leave higher rates in effect to and from intermediate points involving shorter hauls in violation of the long and short haul provisions of section 4(1) of the Act, 49 U.S.C. § 4(1),[4] the railroads also applied to the Commission for the relief from those provisions which section 4(1) permits the Commission to authorize "in special cases." See *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324. The proposed rates and the fourth section application were opposed by the Secretary of Agriculture, the Houston Port Bureau, the Port of New York Authority, the City of Providence, the New Orleans Traffic and Transportation Bureau, Sea-Land, Seatrain, and a motor carrier association. The rates were suspended and placed under investigation in the Commission's I. & S. Docket No. 6834, *Piggy-Back Rates—Between East and Texas*, which docket also embraced the fourth section application as well as certain effective Sea-Land and Seatrain rates between the same points the lawfulness of which is not at issue in this litigation. On December 19, 1960, the Commission issued its report[5] and accompanying order.

[4] For example, the normal TOFC rate on candy from Boston to Dallas is 290 cents per 100 pounds and the distance over a direct rail route is 1,965 miles, while the normal TOFC rate from Boston to Bald Knob, Arkansas, a distance of 1,543 miles, is 236 cents per 100 pounds. Plaintiffs propose to reduce the rate from Boston to Dallas to 214 cents per 100 pounds while maintaining the rate of 236 cents per 100 pounds for the shorter haul to the Arkansas destination.

[5] This is a consolidated report embracing some 43 docket proceedings which were, in turn, consolidated into four dockets for

The Commission found that the proposed TOFC rates equal or exceed out-of-pocket costs for hauls of average circuity for all listed movements by railroad-leased TTX cars and all but six of 66 listed movements by railroad-owned cars, and equal or exceed fully-distributed costs for 43 of 66 movements by TTX cars and for 14 of 66 movements by railroad-owned cars (R. 22).[6] Consequently, the Commission concluded that, with the exception of the six rates returning less than out-of-pocket costs,[7] the proposed TOFC rates are compensatory (R. 22, 34). Similarly, the corresponding Sea-Land and Seatrain rates—whose legality is not challenged in this proceeding—were, with one exception, found to be compensatory (R. 21, 25, 34).

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hearing. The first of these consolidated dockets, I. & S. No. M-10415, *Commodities—Pan-Atlantic Steamship Corporation*, is the title under which the consolidated report is issued. The others are I. & S. No. 6834, *Piggy-Back Rates—Between East and Texas;* I. & S. No. 6906, *Commodities via Pan-Atlantic Between Texas, Louisiana and Florida;* and I. & S. No. M-11375, *Tires, Chemicals and Paints via Pan-Atlantic*. Under consideration in the three named dockets other than I. & S. No. 6834 were numerous rates of Sea-Land not at issue here. It was agreed that the evidence in each of the first two named dockets could be used in both to the extent relevant, and would be incorporated by reference in the last two named dockets. An examiner's report was filed in each of the four named dockets, and the Commission's Division 3 issued a report in I. & S. No. M-10415 (307 I.C.C. 587, R. 76–115).

[6] TTX cars are flatcars leased by the railroads which hold two trailers, while railroad-owned cars have a capacity of one trailer per car (R. 21). No finding could be made as to the relative percentages of the TOFC traffic which would move in either type of car (R. 22, 36).

[7] These six rates were withdrawn by the railroads and are not at issue.

With respect to the relative costs of the competing modes, the Commission found that the Sea-Land costs, both out-of-pocket and fully-distributed, are below the rail TOFC costs for all movements of comparable weight as computed for railroad-owned flatcars, and are below the TOFC costs for all except two of the 66 movements for TTX cars (R. 21, 36). However, the Commission indicated that it was not resting its decision in these proceedings on relative costs. Thus, after concluding that it couldn't determine the low cost mode because of certain variables which affect costs and the absence of rail costs as to many of the rates,[8] the Commission said: "We must recognize, also, that cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates. In the exceptional circumstances here presented, other considerations, herein discussed, appear to us determinative of the issues." (R. 36–37).

The Commission found that uncertainty of ocean transport, infrequency of sailings, and longer transit time than by rail TOFC service are adverse service factors present in both Sea-Land and Seatrain service (R. 11, 13, 26–28); that there is no indication that Sea-Land has moved any traffic at rates as high as competing all-rail boxcar or TOFC rates (R. 22, 34) and it is conceded that Seatrain offers a lower quality service than TOFC (R. 26, 27); that most of

[8] The absence of rail costs as to many of these rates refers to the rail costs for boxcar service, which was the competing rail service with respect to the numerous Sea-Land rates at issue in the other dockets embraced in the consolidated report which are not involved in this litigation.

the shippers prefer rail service to Sea-Land service except at lower rates for the latter (R. 34); and that, in order, to attract traffic, Sea-Land and Seatrain must maintain rates somewhat below those of the rail carriers (*ibid.*). The Commission concluded that the rail rate reductions would precipitate further reductions by the water carriers and "that the rate-cutting activity probably would not stop even at that destructive level, and that quite certainly a further vicious cycle of rate cutting would ensue" (R. 29). It also found (R. 35) that all of the Sea-Land traffic is subject to rail competition; that Sea-Land must recover its fully-distributed costs on its overall operations if it is to continue in operation; and that, if the differentially lower rates which Sea-Land must maintain to attract traffic in competition with the railroads were forced by such competition to be reduced to a point where they failed to recover operating costs plus a reasonable return, Sea-Land's operations would become unprofitable and their continuance threatened.

The Commission noted that while section 15a(3), 49 U.S.C. § 15a(3), prohibits the holding of the rates of a carrier to a particular level to protect the traffic of another mode of transportation, that prohibition is qualified by the words "giving due consideration to the objectives of the national transportation policy declared in the Act." And it pointed out that "It is the declared national transportation policy, among other things, to provide for fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recog-

nize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" (R. 37). It expressly found (R. 38) that "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operations, and thus the continued existence, of the coastwise water-carrier industry generally."

Next, the Commission summarized the facts showing the drastic decline in the Atlantic-Gulf coastwise trade, both in the number of companies engaged in the trade and the tonnage carried (R. 38). The Commission pointed out that at the outset of World War II, all of the vessels employed in the deep-water coastwise trade were taken over by the Federal government for national defense (*ibid.*). Quoting illustrative statements from reports of the United States Maritime Administration, the Senate Interstate and Foreign Commerce Committee, and from an earlier decision of its own, the Commission observed that the importance of coastwise shipping for national defense purposes has been emphasized repeatedly by various governmental sources and that it is important for general public use and to the economy of ports and

coastal areas as an integral part of the national transportation system (R. 38–40).[9]

In addition, the Commission referred to the provisions of sections 305(c) and 307(d) of the Act, 49 U.S.C. §§ 905(c) and 907(d), as indicative of a Congressional intent that, where necessary to permit an essential, efficiently-operated water carrier to participate in the economical movement of traffic, the water carrier service should be accorded some advantage in the form of lower rates. It further noted that this is not confined to port-to-port traffic, for coastwise carriers cannot survive on such traffic alone; that there is no contention that the coastwise carriers involved here are not efficiently operated; and that, while there is a limit beyond which the coastwise carriers cannot be expected to attract traffic from interior points, the water carrier rates under investigation do not go beyond that limit. (R. 40–41).

The Commission concluded (R. 41):

> In the circumstances presented here, we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on sealand and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service.

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[9] For a recent example, see *Ocean Shipping to Support the Defenses of the United States*, Department of the Navy (1961), reproduced at 107 Cong. Rec. 7299–7302 (1961).

It then stated that a 10 percent differential sought by Sea-Land appeared to be excessive but that, in its judgment, the TOFC rates at issue should be maintained on a level no lower than 6 percent above Sea-Land's rates so long as the latter are not increased above their present levels (R. 41–42). Accordingly, the Commission found the proposed reduced TOFC rates not shown to be just and reasonable, directed their cancellation without prejudice to the filing of new schedules in conformity with its conclusions, and denied the fourth section application for relief to establish the rates.

3. On February 2, 1961, the railroads filed suit in the district court to set aside the Commission's order to the extent that it required the cancellation of the TOFC rates. Sea-Land and Seatrain intervened and appeared in defense of the order. On November 15, 1961, the court rendered its opinion, concluding that the order requiring cancellation of the TOFC rates should be set aside, and the Commission enjoined from cancelling TOFC rates which return at least fully-distributed costs of carriage (R. 258).

The court held that the requirement of a rate differential to protect the water carriers is plainly holding up railroad rates to protect another mode in violation of section 15a(3), and that the evidence and findings do not support the Commission's position that the National Transportation Policy compels that result (R. 246–247). The court held that the national defense clause of the National Transporation Policy expresses only a "hoped-for 'end' " and not an "operative policy" effective to provide a basis for the Com-

mission's action, and that, in any event, the Commission's reliance on that clause was not supported by sufficient evidence (R. 256–257). At the heart of the court's decision is its construction of section 15a(3) as precluding the Commission from requiring rail rates differentially higher than water carrier rates to preserve the latter from destruction, except where (1) the rail rates are so low as to harm the rail carriers as well as the water carriers, or (2) the rail rates would deprive the water carriers of a proven inherent advantage of lower cost (R. 249, 251–252). In addition, while the court permitted the cancellation of those rail rates which do not cover the railroads' full costs (R. 258), it indicated that the Commission's rejection of the rail rates which exceed full costs is invalid for failure to find that such action is necessary to preserve the "overall rate structure" of water carriers which are the "overall low-cost mode" or "in general the low-cost mode" (R. 255–256). Finally, the court instructed the Commission that if it finds (1) that the water carriers are in general the low-cost mode and (2) that value-of-service considerations demand water carrier rates on particular movements and commodities which each return to the water carriers more than their fully-distributed costs, the Commission may require that the rail TOFC rates be set high enough to protect the water carrier traffic; but that a rail rate for a particular movement may not be disturbed if it yields rail fully-distributed cost which is lower than the water carrier fully-distributed cost (R. 259).

SUMMARY OF ARGUMENT

I

A. Section 15a(3) was the end product of several years of hearings and controversy on the proper scope and purpose of the regulation of intermodal rate competition. The evolutionary process began with a proposal, advanced by a Presidential advisory committee under the chairmanship of the Secretary of Commerce and supported by the railroads, which would have precluded the Commission from considering the effect of a proposed rate on competing modes of transportation. The proposal, known as the "three shall nots", and a substantially identical version proposed by the railroads were vigorously opposed by the Commission, the motor carriers, and the water carriers.

The "three shall nots" rule was expressly rejected by the Subcommittee on Surface Transportation of the Senate Commerce Committee. As the hearings progressed, section 15a(3) emerged in its present form. The testimony and the reports of the Senate and House committees (*infra*) show that the purpose and effect of the section is to insure that each mode of transportation will be free to assert such inherent advantages as it may possess so that the public may exercise its choice among them, cost and service both considered, and constructive competition will be encouraged. To accomplish this end, the Commission will be free to consider the effect of a proposed rate on competing modes under all the circumstances of a given case. Unfair and destructive competition are to be prevented now as before, and all of the

provisions of the National Transportation Policy, the objectives of which the Commission is expressly required "to give due consideration", apply in their full vigor.

B. We contend that the district court erred in holding that the Commission lacks power to intercede to prevent the threatened destruction of an efficiently operated competing mode of transportation unless the threatened mode is the low cost mode. Such a result does not give full effect to the objectives of transportation regulation enunciated in the National Transportation Policy, which require the Commission to look to the needs of the commerce of the United States and the national defense in administering the Act. We submit that where the survival of an efficiently operated mode of transportation bears an important relationship to the meeting of those needs, costs cannot be the sole criterion governing the Commission's action. Rather, the Commission is obligated to give overriding importance to the preservation of a transportation system adequate to meet the needs of commerce and the national defense.

Here the Commission found that survival of the coastwise water carrier industry is important to the accomplishment of this objective. As a consequence, it properly took such steps as were reasonably required to insure that survival.

II

The court below erroneously assumed that the Commission's decision may have been based upon value of service considerations, *i.e.*, that it rejected reduced rail rates in order to enable the competing water car-

rier to maintain rates returning more than its fully-distributed costs so as to offset the inability of other traffic to bear rates covering such costs. Accordingly, it was led into an abstract enunciation of principles and procedures which, in practical application, would largely prevent the Commission from applying value of service principles wherever carriers of different modes are competing for the same traffic. This Court should withhold its approval from such dictum.

ARGUMENT

INTRODUCTION

This appeal, along with the companion appeals, presents questions of fundamental significance respecting the administration of the Interstate Commerce Act in the important and difficult area of the regulation of intermodal competitive ratemaking. We think it important to emphasize at the outset significant factors which we think are necessary to an appreciation of the context in which these questions are presented.

First, the cost data tended to show that as compared to the rail TOFC movements at issue Sea-Land was the lower cost service, both on an out-of-pocket and a fully-distributed cost basis. Second, the rail reductions are to the same level as the rates of the water carriers, although the water carriers offer a qualitatively inferior service, and are confined to points where the railroads face water carrier competition, the former, higher rail rates being maintained elsewhere. Third, there was no contention by the railroads or shippers that the former rail rates were unreasonably high *per se,* that is, the reductions were

proposed as allegedly necessary to meet competition and not because the former rates exceeded a maximum reasonable level. Moreover, the corresponding water carrier rates which the railroads sought to meet were not unduly high considering the nature of the traffic. In fact, they were found to be lawful (R. 18, 42), and this aspect of the Commission's decision was not challenged in court and is not at issue here. Finally, the purpose and effect of the Commission's decision is neither to insulate the water carriers from rail competition nor to deny the shipping public the benefit of voluntary reductions in rail rates. Rather, it merely disapproved rate parity on the involved movements without prejudice to rail reductions to levels six percent higher than the water carrier rates so long as the latter were not increased above their present levels. The Commission refrained from entering a minimum rate order prescribing such differentials. Thus, its "without prejudice" language was merely an attempt to offer guidance to the carriers as to what, in its judgment, would be a reasonable relationship between rail and water carrier rates, leaving the railroads free to publish rates reflecting the six percent differential or to propose rates reflecting such different relationship as they might justify on a different record. In short, the Commission condemned selectively reduced rates for a superior service not shown to be the low cost service in order to permit an efficiently operated, essential transportation agency to compete at rates which are reasonable and commensurate with a degree of carrier prosperity.

The basic question is whether, under the above circumstances and in the light of section 15a(3), added to the Interstate Commerce Act in 1958, and the National Transportation Policy, the Commission may reject selectively reduced but fully compensatory rail rates [10] to prevent the destruction of a competing coastwise water carrier industry which is important for national defense purposes and for general public use as an integral part of the national transportation system, without resting its decision on a finding that the threatened water carriers possess an inherent advantage of lower costs.

Assuming, *arguendo,* the district court's negative answer to the above question to be the correct view of the law, there is presented the question as to whether it is enough that the Commission find that the protected mode is low-cost on the particular movements at issue or whether it is required to determine in addition the low-cost mode on some overall basis, *i.e.,* that the protected mode is the "overall low-cost" or "in general the low-cost mode", as the district court would seem to require. While we do not find the views of the district court entirely clear, it appears to have held that the Commission would not have been warranted in rejecting rail rates which exceed fully-distributed rail costs to protect the water carriers' rate structure unless it were able to find that (1) the water carriers are in general, or overall, low-cost and

[10] As noted earlier (*supra,* at 12), the Court did not disturb the Commission's decision so far as it required the cancellation of the rail TOFC rates which were below the railroads' fully-distributed cost, and the railroads have not appealed from this aspect of the court's decision.

(2) that the rail rates must be held up above rail fully-distributed costs so that the water carriers may maintain rates which yield a sufficient return above the water carriers' fully-distributed costs to compensate them for the carriage of other traffic at rates which fail to yield their fully-distributed costs. The final question presented is whether the Commission is flatly prohibited from rejecting any rail rate for a particular movement which yields the railroads' fully-distributed cost which is lower than the water carriers' fully-distributed cost for such movement.

While the district court did not accept the interpretation of section 15a(3) urged upon it by the railroads,[11] the necessary effect of the court's decision is to substantially impair the viability of important provisions of the National Transportation Policy and to relegate the Commission to the role of a mere computer of costs in an area of regulation heretofore regarded as requiring the exercise of an informed and flexible discretion to take into account many relevant factors, see, *e.g.*, *Board of Trade* v. *United States*,

[11] In the district court, appellees contended that section 15a(3) forbids the Commission from interfering with the establishment of reduced rates so long as they are compensatory, *i.e.*, cover out-of-pocket costs, unless (1) the competing modes of transportation are in the throes of a destructive rate war evidenced by a series of successive rate reductions depressing rates to dangerously low levels, or (2) the reduced rates are part of a predatory campaign having the design and purpose to destroy competition. See suggestion to this effect at page 5 of appellees' Motion to Affirm in this Court. Thus, the railroads urged an interpretation of section 15a(3) which would render it virtually indistinguishable from an earlier version known as the "three shall nots" (*infra*, at 21–24) expressly rejected by Congress.

314 U.S. 534, 546; *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592–593; cf., *Boston & Maine R.R.* v. *United States,* 208 F. Supp. 661, 675 (D. Mass. 1962), affirmed *per curiam,* 371 U.S. 26. We submit that this result was never contemplated by Congress when it enacted section 15a(3), expressly reaffirming the obligation of the Commission to give due consideration to the objectives of the National Transportation Policy.

I

THE APPLICABLE STATUTORY STANDARDS OF THE INTERSTATE COMMERCE ACT REQUIRE THE COMMISSION TO CONSIDER THE FULL COMPETITIVE IMPACT OF RATE REDUCTIONS, AND REQUIRE IT TO REJECT REDUCED RATES, EVEN THOUGH FULLY COMPENSATORY, WHERE NECESSARY TO PREVENT THE DESTRUCTION OF A COMPETING MODE OF TRANSPORTATION IMPORTANT TO THE NATIONAL DEFENSE AND TO THE COMMERCE OF THE UNITED STATES

A. THE PURPOSE AND EFFECT OF SECTION 15a(3) IS TO REQUIRE THE COMMISSION TO REGULATE INTERMODAL RATE COMPETITION SO AS TO FOSTER CONSTRUCTIVE COMPETITION IN TERMS OF SUCH INHERENT ADVANTAGES OF COST AND SERVICE AS THE DIFFERENT MODES OF TRANSPORTATION MAY POSSESS, AND TO PREVENT COMPETITION WHICH IS DESTRUCTIVE IN THE LIGHT OF THE OVERALL OBJECTIVES OF THE NATIONAL TRANSPORTATION POLICY

Section 15a(3) was the culmination of several years of reports and hearings on the proper purpose and scope of the regulation of intermodal rate competition. In 1955, the President's Advisory Committee on Transport Policy and Organization, under the chairmanship of the Secretary of Commerce, issued a report, sounding the keynote that "Increased re-

liance on competitive forces in ratemaking constitutes the corner-stone of a modernized regulatory program," recommending a revision in the National Transportation Policy, and specifically recommending the elimination of the phrase "unfair or destructive competitive practices."[12] The committee proposed the following new ratemaking rule:[13]

> In determining whether a rate, fare, or charge, or classification, regulation, or practice to be applied in connection therewith, results in a charge which is less than a reasonable minimum charge, as used in this Act, the Commission shall not consider the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation. *Provided, however,* That the provisions of this paragraph shall not be construed to prohibit any carrier subject to this Act from protesting or complaining in the event that a rate, fare, or charge is filed or made effective which it believes to be less than a reasonable minimum charge.

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[12] *Revision of Federal Transportation Policy*, Report by Presidential Advisory Committee on Transport Policy and Organization (1955), reprinted in *Transport Policy and Organization*, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess. (1955).

[13] Proposed section 15a(1) in H.R. 6141, 84th Cong., 2d Sess. (1956), reprinted in *Transportation Policy*, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., Part 1, at 5 (1956).

This proposal, containing what became known as the "three shall nots", was supported by the railroad industry and opposed by the Commission, the motor carriers, and the water carriers.

In vigorously urging adoption of the "three shall nots" rule, the railroads noted with approval that it would limit the Commission to the consideration of whether a particular reduced rate was reasonable *per se* and nondiscriminatory and would preclude any consideration of its effect on other modes of transportation. Thus, the railroads believed that, under the "three shall nots", "the Commission will then have to construe unfair and destructive competitive practices as limited to noncompensatory rates," [14]

[14] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 6141 et al., 84th Cong., 2d Sess., Part I, April and May 1956, at 540, 554. It is interesting to note that the railroads could not bring themselves to completely support the views of the Secretary of Commerce; for, as the hearings progressed, the Secretary expressed the view that increased competitive freedom should extend to intra-mode (rail versus rail) as well as to inter-mode competition. In an abortive effort to accomplish this result, the 1957 version of the Advisory Committee bill added the language to make the "three shall nots" apply to the traffic of carriers of the same mode as well as of any other mode (H. 5521 and S. 1457, 85th Cong., 1st Sess.). In an interview reported in "Traffic World," April 6, 1957, at p. 25, the president of the New York Central (one of the appellees here) represented his views as those of the railroads generally, and stated:

> We think the terms of the new bill would likely permit too much competition.
>
> . . . .
>
> In the case of railroads, for example, this might happen: A small railroad or several small railroads might come in with cut rates that would upset the operations of the

The Commission "recommended strongly" against the proposed addition to section 15a of the "three shall nots" (House Subcommittee Hearings, *supra*, Part III, June 1956, at 1768). It observed that the proposed amendment would limit the Commission to "one test in determining the reasonableness of a rate—whether the rate is compensatory" and that "this would be highly impracticable and inimical to the maintenance of a sound transportation system." The Commission further noted that the proposal "would, in many instances, enable railroads to drive other forms of transportation out of business" and "with the disappearance of competitors the rates of the victors in such a struggle would not long remain on the depressed competitive levels." (*Ibid.*)

H.R. 6141 died in committee. However, the railroads' alternative proposal for a new section 15a(3) incorporating the "three shall nots" was introduced in the 85th Congress as H.R. 5523 and 5524, reading as follows:[15]

> (3) In the exercise of its power to determine and prescribe just and reasonable rates for carriers subject to this Act, the Commission shall not consider the effect of such rates on the traffic of any mode of transportation; or the relation of such rates to the rates of any other mode of transportation; or whether such

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hundred or so major roads. We wouldn't want that to happen.

We need some sort of referee, some sort of umpire.

[15] Printed in *Surface Transportation (Ratemaking Legislation)*, Hearings before the Subcommittee on Surface Transportation of the House Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., April 1957, at 5.

> rates are lower than necessary to meet the competition of any other mode of transportation.

Again the railroads emphasized that the "underlying purpose" of the legislation was to permit them to make rates "without regard to their effect (if any) upon competing modes of transportation" (*id.* at 199). And again the Commission voiced its strong opposition (*id.* at 46 *et seq.*).

From January through April, 1958, hearings were held before a Senate subcommittee under the chairmanship of Senator Smathers, covering the "three shall nots" as well as various proposals to aid the railroads not here relevant. In the course of these hearings, the Secretary of Commerce sent a letter to the subcommittee, withdrawing his support for the "three shall not" rule and unsuccessfully urging an antitrust standard "which would permit the Interstate Commerce Commission, in determining what is less than a reasonable minimum charge, to take into consideration the effect of a rate on competition or on a competitor only where its effect might be substantially to lessen competition or create a monopoly in the transportation industry or where the rate was established for the purpose of eliminating or injuring a competitor." [16]

The subcommittee rejected the railroads' proposal and recommended a new section 15a(3) providing as follows: [17]

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[16] Printed in *Problems of the Railroads*, Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., Part 4, April 1958, at 2348, 2353.

[17] Report of the Subcommittee on Surface Transportation, annexed to S. Rep. No. 1647, 85th Cong., 2d Sess. (1958), at 18.

> In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of traffic by railroad *and not by such other mode.* [Emphasis added.]

While the underscored portion of this proposal carries connotations of the "three shall nots," the subcommittee clearly intended something less restrictive. Thus, after noting that the railroads urged the enactment of legislation substantially restricting the Commission's authority, the subcommittee stated that it was "not convinced that the record before it justifies approval of the railroads' proposal." (*ibid.*).

Continuing, the subcommittee stated that the Commission should "follow the principle of allowing each mode of transportation to assert its inherent advantages" and sought to "admonish the Commission to be consistent in following the policy" which the subcommittee found in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 538 (1945), that the rates of one mode should not be held up to particular level to preserve another mode's rate structure. It also quoted with approval language from this Court's opinion in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 91, to the effect that a mode's lower costs than those of competing modes is an inherent advantage which the Commission is required to recognize. The subcommittee stated its policy to be—

> that each form of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so

> that in every case the public may exercise its choice, cost and service both considered, in the light of the particular transportation task to be performed. The subcommittee believes, and the national transportation policy is clear, however, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers. (*Id.* at 18–19).

In May 1958, the Senate Committee on Interstate and Foreign Commerce held hearings on S. 3778, which contained the Senate subcommittee's version of section 15a(3). The Commission's views were presented by it Chairman, Commissioner Freas, testifying in its behalf. The Commission called attention to the conflict between the direction in the new amendment to the effect that the Commission shall not consider the facts and circumstances attending the movement of traffic by such other mode and the statement in the report of the subcommittee that the Commission should prevent unfair and destructive competitive practices.[18] The Commission observed that although the subcommittee's report indicated that the amendment was not intended to embody the "three shall nots," "nevertheless, the uncertain purpose of the amendment would enable the railroads to contend that it is intended to give them complete freedom, in the presence of competition from another mode of transportation, to establish rates which merely cover out-of-pocket costs." (*ibid.*). Noting the general ac-

[18] *Ratemaking Rule—ICC Act*, Hearings before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., May 1958, at 167.

ceptance of the premise that "a purpose of rate regulation should be to encourage the flow of traffic by the most economical means," the Commission pointed out that determination of the most economical means of transportation "often cannot be made without considering the facts and circumstances attending the movement of the traffic by other modes of transportation" in addition to the proponent of the particular rates (*ibid.*).

The Commission went on to point out that—

> Whenever conditions permit, given transportation should return the full cost of performing carrier service. Certainly full costs in the aggregate have to be obtained in our transportation system if it is to be kept healthy. In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket costs of another. If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier.

Then the Commission noted that in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945), "the proceeding cited with approval in the subcommittee's report of April 30, the question of the distribution of the traffic was gone into at length (see pp. 484 to 492). However, with the proposition that rates of a low-cost carrier should not be held up to protect the traffic of other carriers we are in full accord."[19] (*Id.* at 168)

[19] Later (at p. 177), Chairman Freas again stressed that, "in the *New Automobiles* case, the Commission did consider the facts and circumstances surrounding the movement by all modes

While making it clear that it was not advocating change in the existing Interstate Commerce Act, the Commission suggested that the expressed views of the subcommittee might be incorporated into the Act by substituting for the proposed paragraph the following language (*id.* at 168–169, 179–180):

> (3) In a proceeding involving competition between carriers, the Commission, in determining whether a proposed rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic. Rates of a carrier shall not be held up to a particular level to protect the traffic of a less economic carrier, giving due

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that were involved there." The *New Automobiles* case involved rail-motor carrier competition in which the greater flexibility of trucks in making pickup and delivery gave the motor carriers a service advantage. The motor carriers contended that the railroads should not go below fully-distributed rail cost or the truck rates and sought a minimum rate order to achieve that result. The railroads contended that their rate must be substantially lower than the truck rates, if they are to get their share of the business. It was in this context that the Commission used the term "umbrella", saying (p. 539):

> Freezing the rail and the motor-carrier rates on a common level would allocate additional traffic to the motor carriers, because of their door-to-door service and other advantages. For movements exceeding 200 miles, the rate parity and the advantages of the motor carriers would spread an umbrella over them, and bring them much more of the long-haul traffic, although for such distances they are least fit from a cost standpoint. . . .

Thus, the decision amounted to nothing more than a refusal by the Commission to issue a minimum rate order solely to prevent the low-cost, inferior-service carrier from establishing compensatory rates which would give it a reasonable opportunity to compete.

consideration to the inherent cost and service advantages of the respective carriers.

In response to questioning by Senator Smathers as to whether "the overriding statements in the national transportation policy" would not override the concluding phrase of the subcommittee proposal ("and not by such other mode") to which the Commission objected, and whether the objectionable phrase would prohibit the Commission from considering the provisions of that policy, Chairman Freas expressed the view that a conflict would be created resulting in unnecessary litigation (*id.* at 177). The following colloquy occurred (*id.* at 177–178):

> Senator POTTER. Why don't we put in the amendment to conform with the national transportation policy, strike out the part "by any other mode."
>
> Senator SMATHERS. The way I look at it if you strike that out, it is just like performing an operation——
>
> Senator POTTER. Actually what we want the Commission to do is to conform to the transportation policy.
>
> Senator SMATHERS. That is right.
>
> Commissioner FREAS. We will buy Senator Potter's suggestion.

Returning, at the invitation of Senator Smathers (*id.* at 178), to the Commission's substitute proposal, Chairman Freas called attention to the fact that it would apply to all types of carriers—to intramodal competition as well as intermodal (*id.* at 180). In explanation, he said that "there should be equality between all forms of transportation, and if the

language is to be used, we would suggest that it would not be limited between carriers of different modes" (*ibid.*). In response to questions from Senator Lausche, Chairman Freas stated that the Commission's proposal would be consistent with the congressional policy "that there shall be no deprivation to any mode of transportation of the benefits residing in their inherent advantage," and he affirmed the intent of the Commission "to give to each mode the full benefit of its inherent advantages" (*id.* at 181).

Senator Smathers expressed concern that the Commission's proposal, because of its application to intramodal competition, might engender further controversy and delay (*id.* 182–183). He inquired whether the subcommittee's proposal with suggested changes would accomplish their purposes, and Chairman Freas agreed that it would and that it would not be objectionable to the Commission (*id.* at 183).

On June 3, 1958, the Senate Committee reported S. 3778 with amendments, recommending a new subparagraph (3) to section 15a in the form finally adopted, as follows (S. Rep. No. 1647, 85th Cong., 2d Sess. at 2):

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of trans-

> portation, giving due consideration to the objectives of the national transportation policy declared in this Act.

After pointing out that it had changed the subcommittee's proposal (*ibid.*), the Committee reproduced a substantial portion of the discussion of competitive ratemaking in the subcommittee's report, which it "agrees with and wishes to emphasize" (*id.* at 2–3). It then said (*id.* at 3–4):

> The committee wishes further to emphasize that the amendment in regard to section 5 amending section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent "unfair or destructive competitive practices" as contemplated by the declaration of national transportation policy. Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies.

In response to a request of Senator Magnuson, Chairman of the Senate Committee, the Secretary of Commerce commented on the new ratemaking provision by letter of June 4, 1958 (Hearings before the Senate Committee, *supra*, at 198–201). In his view,

the section would not go far enough "even if construed to permit the full exploitation of the inherent cost advantages. It would permit a rate reduction only if there were an existing or reasonably probable cost advantage" (*id.* at 199). He again advocated more competition "between all carriers whether or not of the same mode" and renewed his proposal of an antitrust standard to govern competitive ratemaking (*id.* at 199, 201).

The House Committee included the Senate version of section 15a(3) as part of H.R. 12832, and reported the bill on June 18, 1958 (H.R. Rep. No. 1922, 85th Cong., 2d Sess.). After briefly summarizing the background leading to the new ratemaking amendment,[20] the Committee stated (*id.* at 13–14):

> The Committee believes that each mode of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that the public may exercise its choice among them, cost and service both considered, in the light of the kind of transportation desired. The committee believes, however, and the national transportation policy is clear, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers.

Expressing the belief that the Commission had not been consistent in allowing the various modes of

[20] In the course of its summary, the Committee noted that the Secretary of Commerce had expressed the view that "We have reconsidered the 'three shall not' rule and feel that it goes too far," and it characterized his proposal of an antitrust standard as "an inchoate suggestion" (*id.* at 13).

transportation to assert their inherent advantages in the making of rates, the Committee, like both Senate committees, referred approvingly to *New Automobiles in Interstate Commerce*, and this Court's decision in *Schaffer Transportation Co.* v. *United States* (*id.* at 14). It then stated (*id.* at 14–15):

> The committee believes that the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act.

The objectives of this Policy of Congress are:

[Quoting the National Transportation Policy]

Finally, the Committee observed that "an amendment to the rule of ratemaking is desirable to serve as a guide to the Commission in achieving consistency" and that it "is of the opinion that the effect of this amendment will be to encourage competition between different modes of transportation for the benefit of the shipping public." (*id.* at 15).

As we interpret the legislative history,[21] it demonstrates that section 15a(3) brought about no funda-

[21] The debates on section 15a(3) in the Senate (104 Cong. Rec. 10816 *et seq.*) and in the House (104 Cong. Rec. 12522) appear to shed little light on the meaning and effect of the section beyond that to be gleaned from the history set forth above, particularly the committee reports. In general, they may be said to manifest an understanding of the intent of section 15a(3) consistent with the expressions in the reports. See remarks of Senators Schoeppel (104 Cong. Rec. 10817), Lausche (*id.* at 10822, 10842, 10859), Potter (*id.* at 10841,

mental change in the law. Rather, it would appear that the section's intended function was to insure that the Commission consistently apply the Congressional policy which had existed prior to the section's enactment, namely, that each mode of transportation be allowed to assert such inherent advantages as it may possess so that the public may exercise its choice among them, cost and service both considered, and constructive competition will be encouraged. Unfair or destructive competitive practices are to be prevented now as before, and all of the provisions of the National Transportation Policy (the objectives of which the Commission is expressly enjoined to give "due consideration") apply in their full vigor.

B. THE NATIONAL TRANSPORTATION POLICY REQUIRES THE COMMISSION TO REJECT REDUCED RATES, EVEN THOUGH FULLY COMPENSATORY, WHERE NECESSARY TO PREVENT THE DESTRUCTION OF A COMPETING MODE OF TRANSPORTATION IMPORTANT TO THE NATIONAL DEFENSE AND TO THE COMMERCE OF THE UNITED STATES. THE COMMISSION'S DECISION WAS A PROPER RESPONSE TO THIS COMMAND.

With the passage of the Motor Carrier Act of 1935, 49 Stat. 543, and the placing of water carriers under regulation in 1940, 54 Stat. 929, the authority and duties of the Commission were significantly expanded. The objectives towards which the enlarged functions were to be directed were supplied by Congress in the National Transportation Policy, 54 Stat. 899, enacted as part of the Transportation Act of 1940. That

10842, 10860), Bricker (*id.* at 10842, 10843–10844), Smathers (*id.* at 10859) and Congressmen O'Neil (*id.* at 12523), Harris (*id.* at 12531–12532).

Policy enjoins the Commission to administer the Interstate Commerce Act so as, *inter alia*—

> to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

It concludes with the explicit command: "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."[22] Thus, it has been characterized by this Court as "the yardstick by which the correctness of the Commission's actions will be measured" (*Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88) and "the Commission's guide to the public interest" (*McLean Trucking Co. v. United States*, 321 U.S. 67, 82).

The new role of the Commission was described by the Court in *Eastern-Central Assn. v. United States*, 321 U.S. 194, 205–206. The Court explained that

[22] This command, the Whittington Amendment, was intended to make certain that the policy statement, itself, would become substantive law. For, as Representative Whittington stated, "unless the declaration of policy is enforced, the meaning of the declaration is absolutely lost". 84 Cong. Rec. 9862 (1939).

with the evolution of other forms of carriage than transportation by rail, the Commission became "not merely the regulator, but to some extent the coordinator of different modes of transportation." Hence, the Commission "was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the National Transportation Policy. . . . This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve *within the limit of the policy* the inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but between or among the different forms of carriage." [Emphasis added.]

Long before the enactment of the National Transportation Policy, Congress had recognized the need to control the destructive aspects of rate competition, especially as it involved competition between the railroads and the water carriers. Thus, when in the Transportation Act of 1920, 41 Stat. 456, 484, it amended section 15(1) of the Interstate Commerce Act, 49 U.S.C. § 15 (1), to empower the Commission to fix minimum rates, it gave as one of the reasons (H.R. Rep. No. 456, 66th Cong., 1st Sess. at 19 (1919):

> [The minimum rate power] would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of

> rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. . . .

The need for protecting water carriers from destruction and the public from the consequences of the elimination of competition was further emphasized by Chairman Esch of the House Committee on Interstate and Foreign Commerce, speaking in support of the minimum rate provision (58 Cong. Rec. 8317):

> There is an advantage in giving the Commission authority to fix a minimum rate. The Commission has never heretofore had that power since the original act was adopted in 1887. We give it the right of fixing the minimum rate in order that it may meet some of the problems arising out of the long-and-short-haul clause as contained in the fourth section. We give it the right of fixing a minimum rate in order that it may protect a water carrier against the destructive competition of a rail carrier. You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before. If the Commission fixes the minimum rate, it can say to the rail carrier: "Thus far you can go, but no farther." The water carrier must be permitted to live. To do this we must provide for the minimum rate.

As the Court said in the *New England Divisions Case*, 261 U.S. 184, 189, 190 n. 8, "The 1920 Act sought to ensure adequate transportation service. . . . To this end, also, the Commission was empowered, among other things . . . to fix minimum, as well as maximum, rates; and thus prevent cut-throat competition and the taking away of traffic from weaker competitors." See also *New York* v. *United States*, 331 U.S. 284, 346 ("[T]he power of the Commission so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them . . . plainly is one of the objectives of the Act. . . .").

Under the 1940 Act, the Commission has, on a number of occasions, rejected reduced but compensatory rates when convinced that they would lead to the destruction of competing modes needed by the public.[23] It would seem clear that the Commission could not do otherwise if it were to preserve for the public an adequate transportation system by all modes and the benefits in improved services and reasonably low rates which flow from competition. In fact, in at least two cases, courts have set aside orders of the Commission approving rate reductions for failure of the Commission to consider whether the rates would lead to the extinction of competing modes. See

[23] *Pig Iron From Rockwood, Tenn., to Chicago and Joliet*, 298 I.C.C. 430 (1956); *Petroleum Products in California and Oregon*, 284 I.C.C. 287 (1952); *Petroleum Products in Illinois Territory*, 280 I.C.C. 681 (1951); *Pig Lead from Brownsville, Tex., to Chicago and St. Louis*, 280 I.C.C. 585 (1951); *Petroleum Products from Los Angeles to Arizona and New Mexico*, 280 I.C.C. 509 (1951).

Pacific Inland Tariff Bureau v. *United States*, 129 F. Supp. 472 (D. Ore. 1955), motion for new trial denied, 134 F. Supp. 210 (1955); *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953).[24] And in *Scandrett* v. *United States*, 32 F. Supp. 995, 997–998 (D. Ore. 1940), aff'd, 312 U.S. 661, before the enactment of the National Transportation Policy, the court held that the Commission had the power to fix minimum rates for the railroads so that they could not put an end to the existence of water competition.

In any event, the National Transportation Policy is explicit in its direction that the Commission act in the light of the needs of national defense (See *United States* v. *Capital Transit Co.*, 338 U.S. 286, 290; *United States* v. *Capital Transit Co.*, 325 U.S. 357, 361–362; *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72, 80–81 (S.D. Cal. 1953)) and the commerce of the United States. So long as the overall objective of the Congressional regulatory plan is "developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as by other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense", the Commission may not refrain from taking the steps which it properly finds necessary to prevent the destruction,

[24] *Cf. Columbia Transportation Co.* v. *United States*, 167 F. Supp. 5 (E.D. Mich. 1958) and *National Water Carriers Assn.* v. *United States*, 120 F. Supp. 719 (S.D. N.Y. 1954), sustaining orders of the Commission approving rail rate reductions on the ground that the traffic would continue to be available to both the railroads and the water carriers with no danger of destroying the latter.

or even the substantial impairment, of an efficiently operated mode of transportation of significant value to the accomplishment of the stated objective. As the Court said in *Capital Transit Co.* v. *United States, supra,* 325 U.S. at 362, "Congress unequivocally reserved to the Commission power to regulate the reasonableness of interstate rates in the light of the needs of national defense. . . ."

Here, the Commission plainly regarded the survival of the coastwise water carrier industry as necessary (R. 38–40, 41). It concluded that coastwise shipping is important to the national defense and that it is important for general public use and to the economy of ports and coastal areas as an integral part of the national transportation system (*ibid*). We submit that this was a conclusion which an informed Commission with continuing responsibilities in this area was competent to reach. Plainly, the Commission had a right to rely on its "cumulative experience" with the regulation of the transportation industry. *NLRB* v. *Seven-Up Co.*, 344 U.S. 344, 349.

Its soundness can scarcely be questioned. Obviously, the coastwise carriers were of vital importance to the national defense during World War II, when all of the vessels employed in the coastwise trade were taken over by the Government for national defense (R. 38). There we had the proof of the pudding. Their continued importance both to the national defense and to the ports and coastal areas, was made plain in the illustrative material from which the Commission quoted—a report of the United

States Maritime Administration, a report of the Senate Interstate and Foreign Commerce Commitee, and a Commission decision (R. 38–40). As the Maritime Administration study and the Senate Committee report reflect, the unique national defense importance of the coastwise shipping industry lies in the ready availability of their ships at sea should a future war devastate land modes of transportation, a factor which may be critical in any initial military or civil defense operation.

The Commission might have excerpted the testimony of Vice Admiral Ralph E. Wilson, Deputy Chief of Naval Operations (Logistics), before a Senate subcommittee in 1960 to the same effect, and also pointing out the desirability of the ships which "are modern and are equipped for containerized operations and for rapid cargo handling."[25] A still more recent expression, issued subsequent to the Commission's decision and confirming in detail its conclusion as to the defense importance of the coastwise carriers, may be found in the letter of Vice Admiral John Sylvester, Deputy Chief of Naval Operations (Logistics) to Senator Butler, dated March 10, 1961, with supporting document entitled *Ocean Shipping To Support the Defenses of the United States,* Department of the

[25] *Decline of Coastwise and Intercoastal Shipping Industry,* Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. (1960) at 105–106. For a statement of the commercial importance of the coastwise service to port cities, see testimony of Hon. W. L. Mingledorff, Jr., Mayor of Savannah, Ga. (*id.* at 83–86).

Navy (1961), reproduced at 107 Cong. Rec. 7299–7302 (1961).[26]

In the present case, the railroads have lowered their rates to the water carrier levels between selected points as a "pilot" effort (R. 19). The Commission,

[26] In his letter, Vice Admiral Sylvester said, "Our coastwise fleet which prior to World War II comprised the largest segment of the merchant marine, remains in a depressed state. . . . This domestic deepwater fleet is more significant to our defense shipping capability than the number of ships and the tonnage would indicate. In their operations these ships are never far from major U.S. ports and, as a group, are the most readily available for emergency use of all ships under U.S. control. . . ." (*id.* at 7299).

The supporting document points out that practically the entire coastal and intercoastal merchant fleet was put into service during World War II "directly supporting the war;" that now only three companies are currently furnishing common carrier service, and one of these, Luckenback Steamship Co. has announced its intention to terminate; that these ships occupy a "particularly significant position" as "the most readily available for emergency usage;" that this means they "must be active and operating commercially at the time they are first needed;" that "at the onset of a major, nuclear war, the domestic deepwater fleet would be uniquely fitted to act as a link between our coastal cities during the period of likely disruption of land transportation;" and that "a number of these ships are especially adapted for rapid cargo handling, giving them an increased value at such a critical time." (*Id.* at 7301). Earlier the special need for "roll-on roll-off ships" and ships "designed to carry containerized and prepalletized cargoes" was stressed (*id.* at 7300).

We note that the above document and the statement of Vice Admiral Wilson, *supra*, completely refute the district court's strained interpretation that it was the now out-moded "break-bulk capacity" which made the coastwise shipping important to the national defense (R. 257). Clearly, the modern, more efficient container ships merely enhance the value of shipping whose basic importance has been, and is today, its availability for emergency use in time of war.

drawing on the record and its cumulative experience with the industry, found that at equal rates the water carriers would not be able to compete—that, in order to attract traffic they must maintain rates somewhat lower than the rail carriers (R. 34). The Commission concluded that the reduced rates of the railroads—the pilot run preliminary to an overall program of rate reductions, for there can be no rational purpose to any such experiment except to pave the way for a general program of like reductions [27]—"can fairly be said to threaten the continued operations, and thus the continued existence of the coastwise water-carrier industry generally." (R. 38). This follows from the fact that the water carriers have only two alternatives: to lower their corresponding rates or not to lower them. If they do not lower their rates, TOFC, the mode of transportation with the superior service, will capture the traffic, depriving the water carriers of revenues and increasing the burden of fixed costs on the rest of their traffic. The more probable alternative (see R. 29) is that water carrier rates will be cut differentially below TOFC rates, since the water carriers have a lower out-of-pocket cost level to which they can descend than has TOFC (R. 21, 36). The net result, as the Commis-

[27] We note that the provisions of section 3(1), 49 U.S.C. § 3(1), make it unlawful for the railroads permanently to favor the Dallas-Ft. Worth area with such preferentially lower rates as they propose in their "limited pilot effort" without making the same advantage available to any other similarly situated "port, port district, gateway, transit, region, district, territory, or any particular description of traffic," where they compete with the water carriers.

sion pointed out (R. 29), would be essentially the same situation as presently obtains, but on a substantially depressed rate level; and the Commission concluded that matters would probably not stop after merely one such round of rate-cutting, but would continue spiraling down destructively.

The current state of water carriers has become a matter of increasing national concern. Thus, in his special message to Congress on regulatory agencies, on April 13, 1961, President Kennedy declared that, despite the articulated goal of the Transportation Act of 1940 "to give each method of transportation its appropriate role in our economy . . . it is disturbing . . . to note that, for example, our common carrier inland waterway traffic, our Great Lakes Traffic, our intercoastal and coastal traffic have been withering away, at a pace far more rapid than appears desirable in the light of the low-cost nature of this method of transportation and its potential role in the event of war." H.R. Doc. No. 135, 87th Cong., 1st Sess. (1961), reprinted at 107 Cong. Rec. 5814 (1961).

There is no doubt that the water carrier industry has suffered a severe decline. Of the 19 coastwise carriers in 1941, only the two involved in the present case are left, and they are transporting a fraction of the tonnage formerly moving in this trade (R. 38). We submit that, in the circumstances, the Commission acted properly to prevent further erosion of an efficiently-operated coastwise water carrier industry in the interests of the national defense, our ports and

coastal areas, and the shipping public.[28] The district court's opinion would require that the entire national transportation system be run solely with an eye to costs, thereby subordinating every other national interest to that often elusive standard. Surely, this can't be the law. See *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216, 223 n. 4, and cases cited there; *Eastern-Central Assn.* v. *United States*, 321 U.S. 194, 210. We submit that such a result is not in keeping with the letter or spirit of the National Transportation Policy.

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[28] As noted earlier, *supra*, at 16–17, the reduced rail rates at issue in the present case were not the result of a belief by the railroads that their former rates were too high *per se*; nor were they the result of shipper complaints to that effect. It was the presence of the water carriers which stimulated the reductions proposed, and the reductions which the Commission would permit. If these water carriers were to be eliminated, it is not likely that the rail rates would long remain at the reduced levels. Competition having been destroyed under the banner of freedom to compete, the public would be the ultimate loser.

The district court erroneously stated that section 4(2) of the Act, 49 U.S.C. § 4(2), would prevent such a result (R. 257). That section provides that where a railroad in competition with a water carrier reduces its rates to or from competitive points, it shall not again increase them until the Commission finds "that such proposed increase rests upon changed conditions other than the elimination of water competition." However, section 4(2) does not apply to rates authorized under section 4(1), *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557, 568, and the rail rates at issue would require such authorization (*supra*, at 6).

II

THE DISTRICT COURT ERRONEOUSLY CONJECTURED THAT THE COMMISSION'S DECISION MAY HAVE BEEN BASED UPON VALUE OF SERVICE PRINCIPLES IN THAT IT WAS PROTECTING SEA LAND RATES IN EXCESS OF FULLY DISTRIBUTED COSTS TO OFFSET SEA LAND RATES ON OTHER TRAFFIC WHICH ARE INCAPABLE OF COVERING FULLY DISTRIBUTED COSTS. ACCORDINGLY, THE LOWER COURT'S CONCLUSIONS AS TO HOW THE COSTS OF CARRIERS OF COMPETING MODES SHOULD BE DETERMINED UNDER VALUE OF SERVICE CONCEPTS SHOULD BE DENIED APPROVAL BY THIS COURT

The court below stated (R. 252) that "We cannot help wondering if the Commission's obvious reluctance to accept as critical the relative costs of service by the competing modes of transportation may not be attributable less to its interpretation of the applicable law than to its fear that the process which it has developed of so-called value-of-service ratemaking will be jeopardized if it be required to make critical findings as to the comparative costs of competing modes of transportation".

The "value of service" concept in ratemaking, as used by the court below and in this brief, is that many high value commodities bear rates returning more than the carriers' fully-distributed costs of transporting such commodities, so that such rates make a contribution to the carriers' fixed or overhead costs which will compensate for the fact that many low value commodities are carried at rates returning less than fully-distributed costs.

We agree with the United States that in this case the Commission was not purporting to protect the Sea Land rates in issue so as to enable it to offset

any inability which it may encounter in recovering its fully-distributed costs of transporting other commodities. Where the Commission applies the value of service principle in protecting or enforcing a higher rate level on high value commodities than would be appropriate where that principle is not applicable, it does so in unmistakable terms. See, e.g., *Tobacco, North Carolina to Central Territory*, 309 I.C.C. 347 (1960). Accordingly, we are sympathetic both with the view of the Department of Justice that this Court should not determine value of service problems in the abstract, and with the suggestion in the appellees' Motion to Affirm that the discussion of value of service in the opinion below may be ignored as dictum. However, we must point out that unless this Court in some way specifically refrains from endorsing the views of the court below on value of service principles (which were not involved in this case) the Commission (and the transportation industry) probably will be confronted in the lower Federal courts, in cases which in fact involve value of service rate making, with judicial reiteration of the value of service views of the court below. Indeed, this process has already begun. *St. Louis-San Francisco Ry. Co.* v. *United States*, 207 F. Supp. 293 (E.D. Mo. 1962).

The speculation of the court below, that the Commission's decision here may have been based upon value of service considerations, led it to make the following statements (R. 255):

> . . . But if the Commission decision does represent such an attempt to preserve its value-

> of-service ratemaking structure, the decision must fall for lack of evidence and necessary findings. For the Commission would have been warranted in holding up the TOFC rates for these 66 movements to protect an *integral overall rate structure* for Sea-Land only on evidence and findings that, notwithstanding the § 15a(3) prohibition of differentials, the *integral overall rate structure* was required by one or more of the policy-factors enumerated in the NTP, and particularly the policy to protect the "inherent advantages" of the overall structure against "destructive competitive practices" and "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." Sec. 15a(2).
>
> . . . True, it found that as to many of the 66 movements in question, Sea-Land was a lower-cost mode than TOFC; but it did not find that Sea-Land service was in general a lower-cost mode that railroad service in general. . . . We conclude that, for lack of evidence and findings that Sea-Land was in general the low-cost mode, the action of the Commission, in so far as it sought to protect Sea-Land's overall rate structure, was an unlawful interference with the forces of competition fostered—not proscribed—by § 15a(3).

Our view that the foregoing language from the opinion below should not be left without comment by this Court is confirmed by the emphasis with which it was summarized by the lower court in the penultimate paragraphs of its opinion, apparently as instruc-

tions to govern Commission action on remand, as follows (R. 258–259):

> Accordingly, the order requiring cancellation of the TOFC rates is set aside, and the Commission is enjoined from cancellation of TOFC rates which return at least the fully-distributed cost of carriage.
>
> If, however, on some enlarged record the Commission shall find that the water carriers are in general the low-cost mode, and if it also finds that value-of-service considerations demand water carrier rates on particular movements and commodities which each return to the water carriers more than their fully-distributed costs, our injunction will not go so far as to prevent the Commission from requiring that TOFC rates be set high enough to protect water carrier traffic; provided, however, a railroad rate for a particular movement, if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost, may not be disturbed. It is noted that at least two of the rates involved in this proceeding were found to fall in this two-pronged category.

The quoted language apparently means that the Commission may not require a railroad, for example, to maintain a rate on particular traffic above a level which covers its fully-distributed cost, to enable a competing carrier of another mode to maintain a rate sufficiently above the latter's fully-distributed cost to offset the failure of other traffic to return fully-distributed cost unless the Commission finds that such competing carrier is (1) the low cost mode on a fully-

distributed cost basis on the particular traffic, and (2) possesses an "overall rate structure" which generally reflects lower fully-distributed costs than the railroad's (or railroads') overall rate structure.

To begin with, it should be noted that the suggested principles or procedures would apply to competitive rate matters involving not only rail vs. water but also rail vs. motor and motor vs. water, as well as to the rates of rail, motor, or water carriers.

To repeat, as here used, value of service in ratemaking means that certain high value commodities bear rates returning more than the carriers' fully-distributed cost of transporting such commodities, thereby making a contribution to the carriers' fixed or overhead costs which will offset the fact that many commodities are carried at rates returning less than fully-distributed costs.[29] While such value of service pricing of transportation services may not be as prevalent as when the railroads had a virtual monopoly

[29] Pertinent here is the following comment of Senator Wheeler, Chairman of Senate Committee on Interstate and Foreign Commerce, during debate on the Transportation Act of 1940 which enacted the National Transportation Policy (86 Cong. Rec. 11290 (1940)):

> Let us suppose, for example, a situation where competing railroads, coast-wise steamship lines, and trucks are all maintaining, to their own and the shippers' satisfaction in general, a comparatively high level of freight rates on various packaged goods of high value, and some carrier, for the sake of a temporary advantage, undertakes to cut these rates. If this must be allowed, ultimately all the competing rates will be reduced and a hole created in carrier revenues which may make it necessary to increase rates on traffic less able to stand the burden. We think that it should not be allowed, and that the Commission

of surface transportation, it remains, as the court below noted, an important and pervasive element of the rate structure (R. 253). It may be, as some contend, that changing competitive and other conditions will subordinate value of service to cost as the basis for pricing transportation services. Nothing in the 1958 amendment or in its legislative history even suggests a Congressional purpose to uproot overnight every vestige of value of service pricing in the rate structure. Stated otherwise, if value of service is to be wholly subordinated to cost, it is essential to many industries and thousands of shippers that it occur gradually so as to minimize its impact upon marketing costs and patterns.

The opinion of the court below, while not in terms outlawing the value of service element in ratemaking under the Interstate Commerce Act, may well do so as a practical matter, and quickly, by imposing a very heavy evidentiary burden as a prerequisite to applying the value of service principle.

We should emphasize that the pertinent portion of the opinion below may be ambiguous as to what portion of the traffic of a protesting or protected carrier must be subjected to such cost analysis. Read literally, it appears to mean that before the low cost mode on

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should be in a position to prevent such a train of events by exercise of its authority over the minimum rates.

At an earlier stage in that legislative process, Senator Wheeler pointed out (84 Cong. Rec. 9964) that:

> . . . there are certain movements of freight traffic on the railroads, or anywhere else for that matter, that will not move unless it has a cheap rate. Much of that includes agricultural products. . . .

the particular high value traffic at issue is entitled to minimum rate protection at above its fully-distributed costs for the transportation of that traffic (in order to offset the inability of other segments of traffic, due to its low value, to bear rates returning fully-distributed costs) that carrier must show that it is also the low-cost mode in terms of fully-distributed costs as to all or most of its traffic (*i.e.*, its overall rate structure). This would impose upon the protesting carrier the novel and heavy burden of preparing current cost studies for each of its traffic movements—since costs vary with the weight and bulk of commodities and the length and direction of movement.

Assuming, however, that protesting carrier A, e.g., Sea-Land, or a railroad or a motor carrier of general commodities, met the burden of breaking down the fully-distributed costs of its traffic consist, those costs must then be compared with the fully distributed cost pattern of the competing mode B's overall rate structure. It should be noted that in many significant intermodal rate cases, each of the competitive modes may involve a significant number of carriers with varying degrees of participation in rates and routes. It may be, although the opinion below does not touch on the point, that much would depend on the relative costs at which A and B carry traffic in competition with carriers other than each other. In any event, B's costs presumably would not be available to A. The opinion below leaves it uncertain as to whether B (or any other carriers with whom A and B compete for

traffic) would be under any duty to come forward with such broad countervailing cost-studies.

The portion of the lower court's opinion here discussed may be read for the perhaps more limited proposition that the carrier to be accorded such minimum rate protection on high value traffic at issue must also produce cost evidence showing that it is the low cost mode on that segment of its traffic which it is carrying at rates returning less than fully-distributed costs. This too would be an impractical burden. It is enough to point out that this would at least double the scope of the cost issues and evidence in such a rate proceeding. Moreover, such a carrier may be carrying low value commodities in competition with carriers of another mode not parties to the immediate rate controversy—thereby complicating the problems involved in ascertaining whether such carrier is the low cost carrier as to such traffic.

Under either reading of this portion of the opinion below, the preparation and presentation of such cost evidence would increase substantially the expense and time involved in any rate proceeding in which value of service principles might be applied. As a practical matter, it might make impossible the application of such principles. This Court is aware of the public interest involved in the completion of rate proceedings, whenever possible, within the seven-month suspension period authorized by Section 15(7) of the Act. Cf. *Arrow Transportation Co., et al.* v. *Southern Ry. Co. et al.*, No. 430, awaiting argument in this Court. Similarly, we are not aware of anything in the history of the 1958 amendment to section 15a(3) which suggests

that Congress intended to require the application of such expensive and time-consuming approaches to costs. To the contrary, the report of the Subcommittee on Surface Transportation of the Senate Committee on Interstate Commerce, which is annexed to S. Rep. No. 1647 85th Cong., 2d Sess. (1958) at 13, urged more expeditious handling of rate cases by the Commission.

One other element of the lower court's discussion of value of service should be noted. It apparently held that even if value of service ratemaking is otherwise appropriate, the carrier which is the low cost mode on a fully-distributed cost basis for a particular movement of traffic may not be required to maintain a rate above its fully-distributed cost (R. 259). Briefly, the application of such a principle would largely eliminate the Commission's ability to require certain high value commodities to contribute something more than fully-distributed costs to carrier overhead, even where necessary to protect the revenues of the proponent of the rate.

Accordingly, we submit that whatever disposition is made of this case, the Court should make clear that the views expressed by the court below on value of service principles and procedures were not in issue on the record before it and are therefore not controlling in Commission and court proceedings in which value of service questions are present.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding sections 1, 301, 901, and 1001, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 15(7), 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new indi-

vidual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose

behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedly as possible.

Section 15a, 49 U.S.C. 15a, provides:

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers

to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.